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IN THE

Supreme Court of the United States

October Term, 1955

No. 926

THEODORE F. OTTEN,

Petitioner,

vs.

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

LEONE PECORARO,
Attorney for Petitioner,
522 - 5th Avenue,
New York 36, N. Y.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3 - 2320
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment and decree of the Court of Appeals for the Second Circuit entered after hearing on February 6, 1956 affirming the judgment and decree of the United States District Court for the Eastern District of New York, Civil Division, entered August 3, 1955, dismissing the complaint.

Opinions Below

The opinion of District Judge Mortimer W. Byers filed on July 8, 1955 is reported at 132 Fed. Supp. 836, and is printed as Appendix A hereto, *infra*, pages 25 to 29. The opinion of the Court of Appeals is reported at 229 F. 2d

919, and is printed as Appendix B hereto, *infra*, pages 30 and 31. The opinion of the Court of Appeals on the previous appeal is reported at 205 F. (2d) 58, and is printed as Appendix C hereto, *infra*, pages 32 to 36. The judgment of the Court of Appeals is printed as Appendix D hereto, *infra*, pages 37 and 38.

Grounds on Which Jurisdiction Is Invoked

The date of the judgment and decree sought to be reviewed and the date of its entry is February 6, 1956. No order granting an extension of time within which to petition for certiorari was made. No rehearing has been sought.

The statutory provision believed to confer on this Court jurisdiction to review the judgment and decree in question by writ of certiorari is the 28 U. S. C. Section 1254 (1).

Questions Presented

1. Does not Section 2, Eleventh, of the Railway Labor Act, 45 U. S. C. § 152, Eleventh, on its own account and when taken in context with the other provisions of the Railway Labor Act, affirmatively sanction and legalize compulsory unionism through a union shop so as to constitute governmental action imposing upon the Union and the employer the restraints of the First and Fifth Amendments to the Constitution of the United States?

2. Has petitioner not been unconstitutionally deprived of his freedom of religion where he has been fired from his job for the sole reason that he will not join a union, his refusal to join being based on his religious beliefs?

3. Has petitioner not been unconstitutionally deprived of his right to work, his freedom of association, and his property by discharge from employment for the sole reason that he refuses to join and support a labor union?

Statute Involved

The statutory provision involved is Section 2, Eleventh of Railway Labor Act 45 U. S. C. Section 152 Eleventh—which reads as follows:

"Section 152. General duties

• • •

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or

their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member

of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. As amended Jan. 10, 1951, c. 1220, 64 Stat. 1238."

Statement of Case

The case was heard in District Court and the Court of Appeals. For convenience the respondents will be referred to as "Railroad" and as "Union".

Petitioner had been employed by respondent Railroad for about twenty-six (26) years prior to his discharge in March 1953. In September 1952, after receiving notice of intention to discharge him because of his failure to join the respondent Union pursuant to a union shop agreement, petitioner secured a temporary restraining order, which was dissolved in February, 1953. Petitioner sought a 3 Judge Court to determine the constitutional question, but the application was denied. The denial was affirmed on appeal. 205 F. 2d 58 (C. A. 2, 1953).

Petitioner is a resident of Staten Island, New York, 48 years of age and married. For twenty-six years prior to

his discharge in March 1953, he had been employed by Railroad in various capacities, and since 1930 (except for about 70 days) as a third-rail maintainer. His weekly salary was at least $79 for a 40 hour week. He had been working for the Railroad for the greater part of his life.

About September 1951, Railroad and certain labor unions entered into an agreement providing for a union shop. The agreement became effective September 1, 1951, and provides in part:

> "In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the carriers now or hereafter subject to the rules and working conditions agreements between the parties hereto shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first performed compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in good standing in such organization; * * *."

Under the agreement, petitioner was required to join the Union within sixty days after the effective date of the agreement or November 1, 1951. At the time the agreement was entered into petitioner was not a member of the Union although prior to June, 1948 he had been a member.

Since about September 1951 down to about June 1952, the Railroad and Union had discussions regarding the status of petitioner's non-union membership. He had steadfastly refused to join the Union, to pay the dues and do the other things necessary and called for under the agreement to consummate union membership.

Finally in June 1952 a formal notice was served upon him to appear before the Union and Railroad to show

cause why he should not be dropped from employment. Pursuant to the notice, a hearing was had on July 7, 1952. At that hearing plaintiff fully set forth the reasons why he refused to join the Union.

After the hearing of July 7, 1952, a decision was made to drop petitioner from employment. He took an appeal in the matter which appeal was heard on July 28, 1952.

By letter dated September 18, 1952, petitioner was notified that he would be dropped from employment on September 29, 1952. The reason for his discharge was stated to be:

> "Sept. 29, 1952—Dropped account failure to comply with the terms of the Union Shop Agreement between the Staten Island Rapid Transit Railway Company and the Non-Operating Organizations signatory thereto, effective September 1, 1951."

Petitioner is a member of a religious society known as "Plymouth Brethren IV" (see Census of Religious Bodies 1926, Department of Commerce, pp. 24-27). At page 27 the following appears:

> "HISTORY, DOCTRINE AND ORGANIZATION"
>
> "The body classified as Plymouth Brethren IV disclaim any designation whatever save those that the Scriptures apply to all believers, as Christians, brethren, etc. To accept any specific title would imply that they are a sect, which they deny, sects or divisions being condemned in I Cor. i, 10-15. Nevertheless, they do not consider that all the doctrines or practices of brethren in religious denominations, from whom they have separated, are those of Christ or his Apostles.
>
> This division among the Plymouth Brethren was due to a cleavage occurring in 1890 from doctrinal differences in England and partly reproduced in the

United States, in regard to the great subject of eternal life. These brethren hold that, save in the sense that they recognize the principles and commandments given in the Scriptures as governing believers who form the house of God, they have no doctrines peculiar to themselves. They believe that all Scripture is the written Word of God, is profitable for teaching, and should be followed in its entirety by Christians, as regulating doctrine and conduct. From it they have learned that Christ's death and resurrection alone suffice for salvation; that, having ascended into heaven, He has sent down the Holy Ghost to indwell all true believers; that as thus indwelt by the Spirit, believers form the one church, or body of Christ, of which He is the head; that, according to Thessalonians iv, the Lord is coming personally to take His people to be with Himself.

They have meeting rooms and regular hours for coming together to partake of the Lord's Supper, for prayer, reading the Scriptures, and preaching. They provide, through collections regularly made, for persons in need, for those who preach the gospel, and for those who minister amongst them. These meetings are scattered mostly through the Northern States. Very few are found in the South. They are much more numerous in the British Empire."

Petitioner became a member of this society about eight (8) years ago having been converted to that faith at that time. Prior thereto he was a member of several societies, including the Union. But upon being converted to his present religious faith he severed all connections with such societies, including the Union, because required to do so by his religion. The members of this religious society are forbidden by the principles of their faith to join or become members of any other societies, labor unions, or organizations. There is no question, and it appears conceded, that

petitioner is acting in good faith and is sincere in his reasons for refusing to join the Union.

That the issues here on the merits are substantially the same as *Wicks* v. *Brotherhood of Maintenance of Way Employees, and Southern Pacific Company,* and *Jensen* v. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and Union Pacific Railroad Company* now before this Court under Docket #808.

Reasons for Granting the Writ

The Court of Appeals Erred in Its Ruling That There Is No Governmental Action in This Case.

In relying upon Judge Hand's ruling that there is no governmental action here because the Union Shop Statute is a mere repeal *pro tanto* of the previous ban against all forms of compulsory unionism, the Court of Appeals was clearly in error, and brought itself into conflict with prior expressions of this Court and with decisions of the Supreme Courts of Nebraska and Kansas.

Petitioner's discharge from employment was shot through with governmental action. It resulted from a combination of (1) legislative action in the passage by Congress of the Union Shop Statute, (2) executive action through the National Mediation Board, and (3) through the actions of the unions in their status as statutory collective bargaining agents.

On its face the Union Shop Statute is more than a mere repeal *pro tanto.* It prescribes very carefully and in detail the limits of compulsory unionism contracts to be allowed. It constitutes, as the unions say in their brief to this Court in No. 451, *Railway Employees' Dept., A. F. of L.* v. *Hanson,* a "continuing regulation" of the subject of compulsory unionism in the railroad industry. It may be re-

marked in this connection that the unions in their brief in the *Hanson* case appear to have abandoned their argument that the statute is nothing more than a *pro tanto* repeal.

Perhaps the clearest point demonstrating that the statute is not a mere *pro tanto* repeal is its provision sweeping aside all present and prospective conflicting state law. Congress simply lacks the power to repeal state law—it can only supersede it in areas in which the Constitution vests it with power to act. On this count it is clear beyond cavil that the Union Shop Statute cannot be appraised as a mere repealing measure.

Considered in the context of the other provisions of the Railway Labor Act, it is likewise clear that the object of petitioner's complaint involves governmental action. Unions are no longer purely private organizations for all purposes, but in cases of this nature, where they act as statutory exclusive bargaining agents exercising a specific authority granted by Congress, they are quasi-governmental agencies subject to the restraints of the Bill of Rights. They cannot claim the benefits of the Railway Labor Act provisions in their favor and at the same time deny the liabilities or conditions which necessarily follow.

That was expressly recognized by this Court in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, by the Supreme Court of Nebraska in *Hanson* v. *Union Pacific R. Co.*, 160 Neb. 669, and by the Supreme Court of Kansas in *Betts* v. *Easley*, 161 Kan. 159. There is no question but that the Union shop contract involved in this case is expressly authorized by the Railway Labor Act, so that the following language from this Court's opinion in the *Steele* case is directly applicable:

> "If the Railway Labor Act purports to impose on petitioner and the other negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily re-

> stricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions, which petitioner raises in his pleading" 323 U. S. at 198-199.

We may ask how, consistently with *Steele,* it can be denied that there is a governmental action in this case which requires appraisal of the Constitutional issues raised on their merits.

The fact that the Union Shop Statute is cast in permissive terms does not, of course, preclude a finding of governmental action for it is well-settled that action which is in any way sanctioned or assisted by Government is subject to the limitations of the Bill of Rights. *Civil Rights Cases,* 109 U. S. 3, 11, 17; *Shelley* v. *Kraemer,* 334 U. S. 1, 14; *Public Utilities Commission* v. *Pollak,* 343 U. S. 451.

It might also be added that the Union Shop Statute is permissive in form only—in point of fact it amounted to a Congressional direction that the railroad industry should establish union membership as a condition of employment. Congress was advised by persons representing the unions and representing management that enactment of the Union Shop Statute would be the practical equivalent of directing the signing and enforcement of the specified union shop contracts.

The Action Complained of Is Subject to the Restrictions of the First and Fifth Amendments to the Constitution of the United States.

In enacting the Union Shop Statute, Congress sought to exercise the power to regulate interstate commerce granted it by Article I, § 8, cl. 3, of the Constitution. This Court has held in numerous decisions, however, that the commerce power is not absolute but is subject to the restrictions found elsewhere in the Constitution, notably the restrictions of the

Bill of Rights. *United States* v. *Chicago, etc. R. Co.*, 282 U. S. 311, 327; *Currin* v. *Wallace*, 306 U. S. 1, 14; *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 704, 705. It is petitioner's contention that, when tested under the First and Fifth Amendments, the Union Shop Statute must be ruled an unconstitutional invasion of his freedom of religion, his right to work, his freedom of association, and his property rights.

A.

The Union Shop Statute effects an unconstitutional invasion of petitioner's freedom of religion.

Petitioner's religion forbids him to join the Union.

Petitioner's right to the "free exercise" of his religion is guaranteed to him by the Constitution and is superior to any rights conferred on respondents by Act of Congress.

The right claimed by petitioner to refuse to join the Union for religious reasons does not conflict with the rights of others to do so or to refuse to do so. There is no grave public emergency that petitioner will interfere with by insisting on the right to practice his religion freely without economic penalty or hardship.

> *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

That case dealt with the refusal of certain persons to salute the flag of the United States because it was contrary to their religion. The children who refused to salute the flag could not attend school and their parents would be punished. This Court held the regulation which compelled the saluting an unconstitutional infringement of the free exercise of appellees' religion.

"* * * The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude" (p. 630).

"* * * The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections" (p. 638).

"* * * No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which,

> without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court * * *" (p. 643).

It is sometimes said that the guarantee of the First Amendment protects only against "prohibitions".

But see:

> *Murdock* v. *Pennsylvania*, 319 U. S. 105;
> *Follett* v. *Town of McCormick*, 321 U. S. 573.

In the flag saluting case (*supra*) the children were denied schooling unless they were willing to salute the flag, which they could not do because contrary to their religion. Here Otten is being denied employment unless he becomes a member of the Union which he can not do consistent with the teachings of his religion.

Judge Hand's conclusion that petitioner's freedom of religion has not been violated is in square conflict with this Court's decision in the *Barnette* case and also conflicts with this Court's pronouncements that First Amendment freedoms occupy a preferred Constitutional position. *Thomas* v. *Collins*, 323 U. S. 516, 530; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Palko* v. *Connecticut*, 302 U. S. 319, 325.

B.

The Union Shop Statute effects an unconstitutional deprivation of petitioner's right to work.

The right to work is a fundamental right without which life itself may not be sustained. This is a natural right of human life and may not be taken away except for compelling reasons and in the public interest.

Section I of Article 22 of the Declaration of Human Rights (United Nations) provides:

> "Everyone has the right to work, to free choice of employment to just and favorable conditions of work and to protection against unemployment."

Petitioner had been in the employ of the Railroad for about 26 years and has developed considerable skill in his work. The employer was entirely satisfied with his work and because he refuses to join the Union he may not work. The Court can take judicial notice of the fact that unions have grown in strength and exercise a powerful influence on employment opportunities. The railroad industry is almost completely unionized and unless plaintiff joins the Union he cannot find work.

Decisions of this Court have settled that the right to work is one of those inalienable liberties guaranteed to all by the Constitution of the United States.

In *Smith* v. *Texas*, 233 U. S. 630 (1914), Smith was convicted for violation of a Texas statute making it a crime for one to serve as a conductor of a freight train who had not served as conductor or brakeman for at least two years. Although he did not meet these particular requisites, it was conceded that Smith, through his years of experience in other railroad positions, was entirely competent to be a freight train conductor. The Supreme Court held that the statute violated the guarantees of the Fourteenth Amendment. It pointed out that:

> "Insofar as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the Constitutional guar-

> antee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling" (233 U. S. at 636).

The Court held that just as one may not be absolutely prohibited from engaging in one of the ordinary vocations of life, so he may not be forbidden to do so except on compliance with some arbitrary and unreasonable condition:

> "The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves" (p. 638).

Compulsory union membership is just as unreasonable and arbitrary a condition of employment as the qualifications struck down in *Smith* v. *Texas*. It cannot, consistently with due process of law, be used to admit only union members to railroad employment and exclude other equally competent to do the work, or to create a privileged class of union members with a monopoly of the right to work in the railroad industry.

In *Truax* v. *Raich*, 239 U. S. 33 (1915), this Court held void an Arizona statute requiring employers of five or more persons to employ eighty percent United States citizens.

It was held that the law violated the Fourteenth Amendment, and was not justified as a proper exercise of the police power. The Court said at page 41:

> "It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

See also *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948), where this Court struck down as violative of the Fourteenth Amendment a California statute which denied to Takahashi, a resident of that State, a license to fish off its shores because he was an alien ineligible for citizenship.

In *Barsky* v. *Board of Regents of New York,* 347 U. S. 442 (1954), this Court affirmed judgments of New York Courts confirming the suspension of the appellant's license to practice medicine on the ground that he had been convicted of a crime. The majority of the Court felt that the basis for the suspension was such that due process was complied with. Three justices dissented. Mr. Justice Douglas in his dissenting opinion made the following statements which we think appropriate and acceptable to all (347 U. S. at 472, 473):

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are

> in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.
>
> • • •
>
> "The Bill of Rights prevents a person from being denied employment as a teacher who though a member of a 'subversive' organization is wholly innocent of any unlawful purpose or activity. Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 216, 73 S. Ct. 215. It prevents a teacher from being put in a lower salary scale than white teachers solely because he is a Negro. Alston v. School Board (C. A. 4th Va.), 112 F. 2d 992. Those cases illustrate the real significance of our Bill of Rights."

The Amendment of 1951 requires that petitioner "as a condition of continued employment • • • shall become members of the labor organization • • • ". This standard of employment has no relevancy to competence nor to petitioner's right to the job.

What was the "evil" Congress was seeking to cure by the Amendment? None was ever really shown apart from the desire of the Union to be compensated for the alleged benefits to non-Union members of the results of collective bargaining. That hardly comes within the concept of an "evil" generally regarded as sufficient to excuse an invasion of the freedom of religion.

Should the desire of the Unions to obtain additional revenue be permitted to override the constitutional right of petitioner to work and earn a living for himself and family?

C.

The Union Shop Statute effects an unconstitutional violation of petitioner's freedom of associatio

Freedom of association is likewise a fundamental right secured by the Fifth Amendment to the Constitution. This freedom has been recognized by this Court in decisions upholding the right of workers to join together in labor unions and bargain collectively with their employer. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34; *Amalgamated Workers* v. *Edison Co.*, 309 U. S. 261, 263; *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 259. The fundamental character of this freedom was recognized in *Thomas* v. *Collins*, 323 U. S. 516, 539, where the Court said, in upholding the right of a labor union officer to address a gathering of workers without first securing an "organizer's card":

> "• • • (t)he right either of workmen or of unions • • • to assemble and discuss their own affairs is as fully protected by the Constitution as the right of business men, farmers, educators, political party members, or others to assemble and discuss their affairs and to enlist the support of others."

This freedom of association is also recognized in Article 20 of the Declaration of Human Rights (United Nations) which spells out the fact that it includes a right not to join any organization as well as a right to join:

> "1. Everyone has the right to freedom of peaceful assembly and association.
>
> 2. No one may be compelled to belong to an association."

This case involves petitioner's right not to join a union. It is submitted that his freedom of association must include

a right not to join or the freedom involved is not a freedom at all. As the Supreme Judicial Court of Maine remarked in a recent decision: "Freedom to associate of necessity means as well freedom not to associate." *Pappas* v. *Stacey*, 151 Me. 36, 116 A. 2d 497, 500, appeal dismissed, *Stacey* v. *Pappas*, 350 U. S. 870. And the Supreme Court of Nebraska, in its opinion in *Hanson* v. *Union Pacific R. Co.*, 160 Neb. 669, 696, said:

> "We think the freedom of association, the freedom to join *or not to join* in association with others for whatever purposes such association is lawfully organized, is a freedom guaranteed by the First Amendment." (Emphasis supplied.)

Patently petitioner's freedom of association has been violated, for he has been fired from his job for exercising his right not to join a union.

D.

The Union Shop Statute deprives petitioner of his property in violation of the Fifth Amendment.

Through his discharge from employment, petitioner has lost his seniority rights with the Railroad. Those rights are property protected by the Fifth Amendment, *Nord* v. *Griffin*, 86 Fed. 2d 481, 483-484; *Primakow* v. *Railway Express Agency*, 56 F. Supp. 413, 416; *Stephenson* v. *New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509, 519.

Petitioner's rights of property in the money demanded of him by the Union have also been invaded. He has a right not to pay and for exercising that right he has been penalized by loss of his job.

E.

There is no justification for the invasion of constitutional rights effected by the Union Shop Statute.

At no time have the unions attempted to show a substantial justification for the power granted them by Congress to force all workers either into a union or out of work. They have, in fact, admitted that their strength and effectiveness as collective bargaining agents would not be enhanced by a union shop. George M. Harrison, Grand President of the Brotherhood of Railway Clerks, appeared before committees of both houses of Congress in support of the bills which became the Union Shop Amendment of 1951 to the Railway Labor Act. He served as spokesman for all of the non-operating railroad unions, including respondent. In the House, he was asked by Congressman Harris whether the union shop would add to the collective bargaining strength of the unions. He replied: "No; I do not think it would affect the power of bargaining one way or the other, Congressman Harris • • • If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic power at that stage of development as I will ever have. • • • " *Hearings Before Committee on Interstate and Foreign Commerce on H. R. 7789,* 81st Cong., 2nd Sess. 20-21 (1950).

A Presidential Emergency Board was appointed by President Roosevelt in 1942 to consider union demands advanced at that time for a union shop. That Board, known as the "Scharfman Board", correctly ruled that a union shop was forbidden by the provisions of the Railway Labor Act then in effect. But the Board also examined the merits of the unions' demands, and concluded:

> "Such an examination leaves the Board unconvinced on the ground of necessity. In the first place, the unions are not suffering from a falling off in mem-

bers. On the contrary, as stated earlier, membership has been growing and at the present time appears to be the largest in railroad history, with less than 10 per cent nonmembership among the employees here represented.

"Second, the evidence presented with respect to danger from predatory rivals seemed to the Board lacking in sufficiency; especially so in the light of the evidence concerning membership growth.

"Third, no evidence was presented indicating that the unions stand in jeopardy by reason of carrier opposition. A few railroads were mentioned on which some of the unions do not represent a majority of their craft or class, and do not have bargaining relationships with the carrier. But the exhibits show that these unions are the chosen representatives of the employees on the overwhelming majority of the railroads, and that recognition of the union is general. The Board does not find therefore that a sufficient case has been made for the necessity of additional protection of union status on the railroads." Supplemental Report to the President by the Emergency Board, May 29, 1943."

At the trial of *Sandsberry* v. *International Association of Machinists,* Supreme Court of Texas, No. A-5061, Dr. Leo Wolman, Professor of Economics at Columbia University, testified as to the growth of the railroad unions during the years 1934-1951 when they enjoyed no compulsory membership devices. In those years they trebled their membership. extended their jurisdiction to cover, for practical purposes, every mile of railroad track in the United States, and registered correspondingly large gains in their financial positions. An economic witness called by the unions did not controvert Dr. Wolman's testimony, but actually conceded that a union shop is not necessary to the unions.

Conclusion

Since there is no basis for justifying the violation of petitioner's freedom of religion and the deprivation of his right to work, his freedom of association, and his property affected by the Union Shop Statute, it is submitted that the Statute is unconstitutional, null and void. The decisions below to the contrary are in error and should be reversed.

Wherefore, petitioner prays that the writ of certiorari herein sought should be granted by this Honorable Court.

Respectfully submitted,

LEONE PECORARO,
Attorney for Petitioner.

APPENDIX A

(Opinion of District Judge Byers)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil No. 12926

THEODORE F. OTTEN,

Plaintiff,

against

BALTIMORE & OHIO RAILROAD COMPANY and THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Defendants,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Intervenor-Defendant.

July 8, 1955.

LEONE PECORARO, Esq., Attorney for Plaintiff.

ROBERT SCHWEBEL, Attorney for Defendant, The Staten Island Rapid Transit Railway Company, by: JOHN C. AVERY, Esq., of Counsel.

HAROLD W. HARRISON, Esq., Attorney for Defendant, International Brotherhood of Electrical Workers, by: CHARLES S. CORBEN, Esq., and MILTON KRAMER, Esq., of Counsel.

BYERS, *D. J.*:

This plaintiff was formerly an employee of the Staten Island Rapid Transit Railway Company now the sole de-

fendant, continuously from February 1, 1941 until March 1, 1953 when he was discharged because of his failure to join the International Brotherhood of Electrical Workers, the intervening defendant. That was the union with which his employer entered into a union ship agreement bearing date August 28, 1951.

The agreement was sanctioned by the applicable provisions of the Railway Labor Act as amended in 1951, see *Title 45 U. S. C. § 152.*

The plaintiff's cause is discussed in the opinion of the Court of Appeals for this Circuit, reported in *205 Fed. (2) 58.* There the court affirmed an order of Judge Abruzzo who had denied plaintiff's motion for a temporary injunction, and for the appointment of a three judge court *(Tit. 28 U. S. C. § 2282)* to pass upon plaintiff's suit for a final injunction based upon the alleged unconstitutionality of the said 1951 amendment.

Since the court was dealing with an order, the occasion was probably not technically appropriate for directing a judgment of dismissal, although the opinion seems to indicate that inevitable outcome of the litigation.

It was deemed this court's duty when the case was called for trial, to receive all testimony deemed to be relevant by the litigants, and to make findings to the end that the decree to be entered shall be in legal form for review.

That which was offered at the trial was little if any in extension of the facts as discussed in the opinion of the Court of Appeals. Thus nothing is seen to be presently required by way of discussion in making the following:

Findings of Fact

1. The plaintiff Theodore F. Otten, being then a "third-rail maintainer" in the employ of the Staten Island Rapid

Transit Railway Company, was discharged from his employment for the sole reason that he refused to join the International Brotherhood of Electrical Workers.

2. He had been continuously in the said employ from February 1, 1941, and his work record was excellent.

3. The said discharge was ordered by virtue of the provisions of a union shop agreement bearing date of August 28, 1951 between his employer and the intervening defendant, which was the duly qualified collective bargaining representative of the craft in which the plaintiff pursued his calling.

4. The said contract was entered into pursuant to the applicable provisions of the Railway Labor Act as amended in 1951.

5. The said discharge was ordered by the defendant pursuant to demand made by the intervening defendant for the reason that the plaintiff refused to become a member of that union.

6. The plaintiff's refusal to join the said union was a matter of conscience, based upon the teachings of the religious body of which he was a member, and not because of any hostility upon his part to labor unions in general, or the intervening defendant in particular.

7. The said discharge resulted in financial loss on the part of the plaintiff, namely, his loss of pay as a third-rail maintainer.

8. It is impossible for failure of proof, to state the loss in dollars so occasioned to the plaintiff.

The factual situation thus recapitulated is appealing in the equitable sense, for among those who believe that even the impressive contributions which labor unions have

made to the general welfare of the nation, do not justify legislation depriving a man of his livelihood solely because of non-membership in a union, the writer of this opinion happens to be one.

Nonetheless, the Court of Appeals has spoken on the merits of this controversy, which settled the matter for this court.

It has not been overlooked that the legislation is held not to involve any question of constitutionality because in terms it merely permits contracts which prior to 1951 were forbidden by the section of the Railway Labor Act which was in part repealed in 1951.

Seemingly it is not deemed requisite to appraise the amendatory legislation according to its operation, rather than to the somewhat adroit method through which an obvious purpose was accomplished. If the statute had been cast in plain terms to read that any employee of an interstate railroad who refused to join a trade union could for that reason alone be discharged, perhaps the way would have been deemed to be open to challenge such a law as offending the Fifth Amendment and perhaps other provisions of the Constitution.

The plaintiff's brief interestingly discusses the subject, but without efficacy to persuade this court that it is free to announce its own conclusions in face of that which has already been written.

The defendant moved to dismiss on the ground that the Court of Appeals has ruled out the only possible federal question, which leaves nothing for this court to decide, since diversity is not present between the plaintiff and its former employer. Decision was reserved in the belief that something short of constitutionality may be present with regard to the construction of the Railway Labor Act which is clearly a federal statute. Further,

because the Court of Appeals may have deliberately refrained from saying that the complaint should have been dismissed. Adhering to that view, the motion is denied.

Conclusion of Law

The complaint must be dismissed for failure on the part of the plaintiff to prove that he is entitled to the claim for relief which he has stated in his complaint, but without costs.

Settle decree.

W. W. B.
U. S. D. J.

APPENDIX B

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 193—October Term, 1955

(Argued January 20, 1956 Decided February 6, 1956.)

Docket No. 23821

THEODORE F. OTTEN,

Plaintiff-Appellant,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Defendant-Appellee.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Intervenor-Defendant-Appellee.

Before:

MEDINA, HINCKS AND WATERMAN,

Circuit Judges.

Appeal from a decree of the District Court of the United States for the Eastern District of New York. Mortimer W. Byers, *Judge.*

Plaintiff appeals from the dismissal of his action to enjoin the defendant, his employer, from discharging him under a union shop agreement and to declare unconstitu-

tional the agreement and the section of the Railway Labor Act relating to such agreements. 45 U. S. C. A. § 152 (11th). Affirmed.

LEONE PECORARO, New York City, for plaintiff-appellant.

SYDNEY R. PRINCE, JR., Baltimore, Maryland, ROBERT SCHWEBEL, New York City and JOHN C. AVERY, New York City (E. H. Burgess, of Counsel), for defendant-appellee, The Staten Island Rapid Transit Railway Company.

MILTON KRAMER, Washington, D. C., CHARLES S. CORBIN, New York City and LOUIS SHERMAN, Washington, D. C., for intervenor-defendant-appellee.

PER CURIAM:

Obedient to his sincere religious convictions, plaintiff refused to join the International Brotherhood of Electrical Workers, intervenor herein which had entered into a union shop agreement with the defendant, plaintiff's former employer. He brought this suit to avert his then impending discharge based upon such refusal, his theory being that the 1951 amendment to the Railway Labor Act, 45 U. S. C. A. § 152 (11th), as applied to him is an unconstitutional interference with the free exercise of religion.

On a prior appeal, we affirmed an order denying plaintiff's motion for the appointment of a three-judge court to pass on the constitutionality of the statute. Neither the trial which was subsequently had nor the briefs on the present appeal raise any questions that seem to us to require any amplification of our prior opinion, reported in 205 F. 2d 58.

Affirmed.

APPENDIX C

(Opinion of Court of Appeals on Previous Appeal)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 255—October Term, 1952

(Argued May 5, 1953 Decided June 8, 1953)

Docket No. 22672

THEODORE F. OTTEN,

Appellant,

v.

BALTIMORE & OHIO RAILROAD COMPANY AND STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellees,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Intervenor-Appellee.

Before:

SWAN, *Chief Judge,*
L. HAND and AUGUSTUS N. HAND, *Circuit Judges.*

On appeal from an order of the District Court for the Eastern District of New York—Abruzzo, *J.*, presiding—denying the plaintiff's motion for a temporary injunction.

LEONE PECORARO, for the appellant.
SYDNEY PRINCE, for the appellees.
LESTER P. SCHOENE, for the intervenor-appellee.

Appendix C

L. HAND, *Circuit Judge*:

The plaintiff appeals from an order of the District Court, denying his motion for a temporary injunction restraining the defendant railroads from discharging him from their employ; and also from an order allowing the International Brotherhood of Electrical Workers to intervene. (Since the second order is clearly unappealable, we shall disregard it.) Two points arise: (1) whether the action should be tried to a court of three judges under the Judiciary Act;* and (2) whether, if not, it was right to deny the injunction. The facts, which were undisputed, were as follows. Otten, the plaintiff, is a "third-rail maintainer" employed by the defendant railways. He was in their employ in September 1951, when they entered into a contract with the intervening union providing for a "union shop": that is, that all employees should become members of the union within 60 days after they were engaged by the railways, and that they should thereafter "maintain membership in good standing" in the union. Otten refused to join the union because his religious scruples forbade his becoming a member of any organization, composed in any part of "unbelievers": he is a member of the "Plymouth Brethren IV," who deduce this duty from Chapter 6, verse 14, of the Second Epistle to the Corinthians. The union offered to dispense with Otten's becoming a member formally, if he would pay the same dues, fees and assessments that were required of members; and it offered to deposit his payments in its funds for the support of its retired members. Since, however, this did not obviate the objection of an association with unbelievers, Otten's religion still forbade his acceptance. After protracted negotiations seeking an accommodation the defendants discharged him, and he thereupon sued for reinstatement on the ground that the

* § 2282, Title 28, U. S. C.

Railway Labor Act * is unconstitutional, in authorizing a "union shop" agreement between the roads and the union. Judge Abruzzo decided that the case did not require a "three judge" court, and that the plaintiff was not entitled to a preliminary injunction on the merits.

The Eleventh subsection of § 152 of Title 45, U. S. C. permits a railway and a union to agree to a "union shop" notwithstanding any "statute or law," state or federal, that forbids such agreements. The action being to enjoin the performance of such an agreement because it compels the railroads to discharge the plaintiff, can fall within § 2282 of the Judiciary Act ** only if such an injunction would restrain the "enforcement, operation or execution" of the subsection. We cannot understand how the subsection can be regarded as conferring validity on the agreement, since all it does is to exempt it from nullification by other statutes or laws. It is true that at the time of its passage in 1951 Subsection Fifth of § 152 made it unlawful for a railway to require an employee to join any union as a condition of employment, and we may assume, *arguendo,* that that subsection still forbids a "closed shop." Be that as it may, to succeed, the plaintiff must insist that Subsection Eleventh is unconstitutional because it repealed Subsection Fifth so far as it had affected "union shop" agreements; and that it affirmatively legalized them. That, however, is plainly a misconception of its effect, which was equivalent only to a repeal, *pro tanto,* of Subsection Fifth. Although that subsection had made such agreements illegal, its repeal left them as they were before it was passed; and there can be no plausible argument that to repeal such a statute was unconstitutional—certainly, if no vested rights had accrued upon the faith of the repealed statute. In this aspect the plaintiff's claim of unconstitu-

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* § 152 Eleventh, Title 45, U. S. C.

** § 2282, Title 28, U. S. C.

tionality is too "unsubstantial" to require a "three-judge" court.* That, however, is not necessarily a final answer, for it might be that a "union shop" agreement was invalid at common-law; and, if so, there is at least a plausible argument that Subsection Eleventh did indeed positively and affirmatively establish its validity, and a challenge to its constitutionality, so considered, might not be "unsubstantial." This would, it is true, involve reading the word, "law," in Subsection Eleventh to include common-law; but we shall assume that that is permissible. The answer is, however, that in New York, where the plaintiff was employed and where the agreement impinged upon him, a "union shop," and perhaps even a "closed shop," agreement was valid at the common law.** Therefore, from no view can the constitutionality of Subsection Eleventh be considered to be involved and it was right not to assemble a "three-judge" court. There remains the question whether the denial of an injunction was proper.

On the merits there can be no doubt. The union has not excluded the plaintiff; on the contrary it has made substantial concessions to induce him to join. The situation is *toto coelo* different from *Steele* v. *Louisville & Nashville Railway Co.*, 323 U. S. 192, where it did exclude Steele. Otten complains that the other employees deem it in their interest to combine and are not willing to work with anyone who will not combine with them. It is true that in so doing they exercise the strongest kind of economic sanction upon the railways not to employ him unless he will join, but both their combination and the railways' refusal

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* *Ex parte Buder*, 271 U. S. 461, 467;
Ex parte Poresky, 290 U. S. 30;
California Water Service v. *Redding*, 304 U. S. 252;
William Jameson & Co. v. *Morgenthau*, 307 U. S. 171.

** *National Protective Association* v. *Cumming*, 170 N. Y. 315;
Jacobs v. *Cohen*, 183 N. Y. 207;
Williams v. *Quill*, 277 N. Y. 1.

are lawful, unless it be because they conflict with his scruple. This conflict results in making it necessary either for the union to yield what it deems to be one of its important interests—a "union shop" with the control that that gives them in dealing with the railways—or for the plaintiff to yield on a point of conscience. Such conflicts are inevitable; and, when to economic sanctions no political sanction is added, they do not ordinarily raise any constitutional question. The First Amendment protects one against action by the government, though even then, not in all circumstances;* but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the *iniquitous dens,* no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Order affirmed.

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* *Reynolds* v. *United States,* 98 U. S. 145.

APPENDIX D

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February one thousand nine hundred and fifty-six.

Present:

HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

Civ. 12926

THEODORE F. OTTEN,
Plaintiff-Appellant,

v.

BALTIMORE AND OHIO RAILROAD CO., and THE STATEN ISLAND RAPID TRANSIT RAILWAY CO.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

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